

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE PHOENIX INSURANCE COMPANY a/s/o
Visual Graphic Systems, Inc.,

Index No.: 07-CV-11177

Plaintiff,

-against-

VERIFIED ANSWER

DHL EXPRESS (USA), INC.; STAMACK
CONSTRUCTION, LLC; and CON-TECH, INC.,

Defendants.

-----X

Defendant, STAMACK CONSTRUCTION, LLC, by and through his attorneys, LAW OFFICES OF DONALD L. FRUM, hereby answer the complaint as follows:

1. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered "1," "2," "3," "4," "5," "6," "7," "8," "9," "10," "11," "12," and "15" of the complaint.
2. Denies the allegations contained in paragraphs numbered "13," and "14" of the complaint.

AS AND FOR A FIRST CAUSE OF ACTION

3. The Defendant, STAMACK CONSTRUCTION, LLC, answering paragraph numbered "16" repeats and reiterates the answer to each and every allegation contained in paragraphs "1" through "15" inclusive as if set forth at length herein.

4. Denies the allegations contained in paragraphs numbered "17 (a through t)," and "18" of the complaint.

AS AND FOR A SECOND CAUSE OF ACTION

5. The Defendant, STAMACK CONSTRUCTION, LLC answering paragraph numbered "19" repeats and reiterates the answer to each and every allegation contained in paragraphs "1" through "18" inclusive as if set forth at length herein.
6. Denies the allegations contained in paragraphs numbered "20," "21," and "22" of the complaint.

AS AND FOR A THIRD CAUSE OF ACTION

7. The Defendant, STAMACK CONSTRUCTION, LLC answering paragraph numbered "23", repeats and reiterates the answer to each and every allegation contained in paragraphs "1" through "22," inclusive as if set forth at length herein.

8. Denies the allegations contained in paragraphs numbered "24," "25." "26," "27," "28," and "29" of the complaint.

AS AND FOR THE SECOND THIRD CAUSE OF ACTION

9. The Defendant, STAMACK CONSTRUCTION, LLC answering paragraph numbered "30", repeats and reiterates the answer to each and every allegation contained in paragraphs "1" through "29" inclusive as if set forth at length herein.

10. Denies the allegations contained in paragraphs numbered "31." "32," "33," "34," "35," "36," "37," and "38" of the complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

11. Pursuant to CPLR 4545 (c), any award to the Plaintiff for economic loss shall be reduced by the amount of economic recovery received from collateral sources.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

12. The occurrence complained of was caused in whole or in part by the culpable conduct attributed to the Plaintiff, their agents, servants and/or employees and that by reason thereof the amount of damages recoverable, if any, shall be diminished in whole or in part by that portion of which the culpable conduct attributed to the Plaintiff bears to the alleged conduct of the defendant which allegedly caused the damages.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

13. The conduct of plaintiff and others, whose conduct this answering defendant is not responsible, proximately caused in whole or in part any and all injuries or damages allegedly sustained by plaintiff.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

14. Plaintiff failed to take all necessary and proper steps available to mitigate its damages.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

15. The limited liability provisions of Article 16 of the CPLR are applicable.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

16. The Court lacks personal jurisdiction over the answering defendant.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

17. The within cause of action is barred by the Statute of Limitations in that said action was not commenced with the applicable statute of limitations period.

AS AND FOR A EIGHTH AFFIRMATIVE DEFENSE

18. Upon information and belief, plaintiff's claims are barred in whole or in part for failure of plaintiff to join a necessary party(s).

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

19. The within cause of action is barred by the Statute of Limitations in that said action was not commenced with the applicable statute of limitations period.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE

20. The claims asserted in the Complaint are barred, in whole or in part, because the subject
Dust was not unreasonably dangerous.

AS AND FOR A ELEVENTH AFFIRMATIVE DEFENSE

21. The claims asserted in the Complaint are barred by the doctrine of latches, waiver, and/or estoppel.

AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE

22. Plaintiff's Complaint fails to state a claim for punitive damages upon which relief can be granted.

AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE

23. This answering defendant asserts that all of plaintiff's claims are barred or diminished because of the failure of plaintiff or other parties or non-parties to preserve evidence.

AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE

24. Plaintiff's Complaint fails to state a cause of action cognizable in law or equity against this answering defendant, and the Complaint must therefore, be dismissed.

AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE

25. Plaintiff's Complaint fails to set forth facts that give rise to a claim against answering defendant.

AS AND FOR A SIXTEENTH AFFIRMATIVE DEFENSE

26. Plaintiff lacks standing to bring this action.

AS AND FOR A SEVENTEENTH AFFIRMATIVE DEFENSE

27. Plaintiff's claims are barred by the controlling terms and conditions of relevant insurance policies.

AS AND FOR A EIGHTEENTH AFFIRMATIVE DEFENSE

28. This answering defendant asserts that it intends to reply upon such other defenses as may be available or apparent during discovery, and hereby reserves its right to amend its answer to plead said defenses.

**AS AND FOR A CROSS-CLAIM AGAINST THE CO-DEFENDANTS
DHL EXPRESS (USA), INC. and CON-TECH, INC.**

29. It is respectfully alleged that if the plaintiff were caused to sustain damages at the time and place set forth in the plaintiffs' complaint through any carelessness, recklessness and/or negligence other than the plaintiffs' own negligence, carelessness and recklessness, said damages were sustained by reason of the primary carelessness, reckless and negligence and/or affirmative acts of omission and commission, of the Co-Defendants, DHL EXPRESS (USA), INC. and CON-TECH, INC., individually and/or their agents, servants and/or employees, with the negligence, if any, on the part of this answering defendant, STAMACK CONSTRUCTION, LLC, being secondary and/or derivative only.

30. That by reason of the foregoing, the CO-DEFENDANTS, will be liable to the answering defendant in the event and in the amount of recovery herein by the plaintiff, or in such amount as the Court of Jury may direct.

WHEREFORE, the Defendant, STAMACK CONSTRUCTION, LLC, demands judgment dismissing the complaint of the plaintiff herein, granting judgment over and against the

co-defendants on the cross-claims, together with attorneys fees, costs and disbursements of this action, and for such other and further relief as to this Court may deem just and proper.

Dated: Elmsford, New York
April 1, 2008

Yours, etc.,

LAW OFFICES OF DONALD L. FRUM

By: Paul S. Zilberfein

Paul S. Zilberfein, Esq. (7462)

Attorneys for Defendant

STAMACK CONSTRUCTION, LLC

565 Taxter Road - Suite 150,

Elmsford, NY 10523

914-347-5522

To:

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(212) 808-0700

CON-TECH, INC.
1035 63rd Street, 2nd Floor
Brooklyn, NY 11219

ATTORNEY'S VERIFICATION

Paul S. Zilberfein, Esq., an attorney duly admitted to practice in the courts of New York State, hereby affirms under penalty of perjury and pursuant to CPLR § 2106 as follows:

Affirmant is associated with the LAW OFFICES OF DONALD L. FRUM, the attorneys of record for the Defendant, STAMACK CONSTRUCTION, LLC, in the within action and as such is fully familiar with the facts and circumstances heretofore had herein by virtue of the file maintained by this office.

Affirmant has read the foregoing **VERIFIED ANSWER** and the same is true to affirmant's own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters affirmant believes them to be true.

This verification is made by an attorney because the Defendant, STAMACK CONSTRUCTION, LLC, is not in the same County where your affirmant's office is located.

Dated: Elmsford, New York
April 1, 2008

Yours, etc.,

LAW OFFICES OF DONALD L. FRUM
By: Paul S. Zilberfein
Paul S. Zilberfein, Esq. (7462)
Attorneys for Defendant
STAMACK CONSTRUCTION, LLC
565 Taxter Road - Suite 150,
Elmsford, NY 10523
914-347-5522

ATTORNEY AFFIRMATION OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

Paul S. Zilberfein, Esq., an attorney duly admitted to practice law in the State of New York affirms the truth of the following under penalty of perjury:

On April 1, 2008, I served a true copy of the annexed:

VERIFIED ANSWER

in the following manner: By mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee as indicated below:

To:

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CON-TECH, INC.
1035 63rd Street, 2nd Floor
Brooklyn, NY 11219

Dated: Elmsford, New York
April 1, 2008

Paul S. Zilberfein
Paul S. Zilberfein, Esq. (7462)

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